SUPREME COURT OF THE UNITED STATES.

SEPTEMBER TERM, 1955.

No. .....

FERRIEL M. BARNETT,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
a Corporation,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI.

In the
UNITED STATES DISTRICT COURT,
Eastern Division of the Eastern Judicial
District of Missouri.

AMENDED COMPLAINT.

1. This action arises under Sections 1 to 46, inclusive, and Sections 51 to 60, inclusive, of Title 45 of the U. S. Code.

2. The Defendant, Terminal Railroad Association of St. Louis, is now, and was at all times herein mentioned, a corporation duly organized and existing according to law, and engaged in business as a common carrier by railroad in the City of St. Louis and State of Missouri.

3. That at all times hereinafter mentioned, Plaintiff was employed by Defendant as a car-repairman in Defendant's Rankin Coach Yard in St. Louis, and both Plaintiff and Defendant were engaged in interstate commerce.

4. That on December 29, 1950, Plaintiff was engaged in the course of his employment by Defendant in inspecting brake shoes and making an air test on passenger cars of the Wabash Railroad Company, which other employees of the Defendant had previously placed in said coach yard and were subsequently to remove therefrom; and that defendant negligently allowed and permitted the air brake hose and the steam pipe on each of two of said cars to remain uncoupled and in a position where steam was escaping from the steam pipe between said cars at a time when the weather was below freezing and as a direct result of such negligence ice formed in and upon the couplers of said air hoses and wholly or partly as a result thereof, Plaintiff was unable to make a secure coupling of said air hoses by reason of the existence of ice in and on such coupling, so that they burst apart, struck, and injured Plaintiff, as hereinafter stated.

5. Plaintiff's right knee, leg, back, spine and sacroiliac joint and all the bones, tissues, tendons, discs, cartilages, ligaments, nerves, membranes, arteries, veins and blood vessels were torn, mashed, bruised, ruptured, broken, fractured, compressed, irritated, paralyzed, and the function of all of said parts was seriously impaired and arthritis in Plaintiff's spine and right knee was aggravated; Plain-

tiff has been caused to suffer loss of hearing and dizzy spells; that all of said injuries have caused and will in the future continue to cause Plaintiff to suffer pain of body and mind; that Plaintiff has been caused to lose his earnings as a car-repairman; that Plaintiff is totally and permanently disabled from following any gainful occupation and all of the aforesaid injuries are permanent and disabling; that Plaintiff has been caused to incur medical expenses by reason thereof; all to Plaintiff's damage in the sum of One Hundred Thousand ($100,000.00) Dollars, for which sum Plaintiff prays judgment, together with his costs.

Haley, Fredrickson & Caruthers,
St. Louis, Missouri,
Attorneys for Plaintiff.

In the
UNITED STATES DISTRICT COURT.

ANSWER.

Terminal Railroad Association of St. Louis, defendant in above entitled cause, for its answer to Plaintiff's Amended Complaint filed September 24, 1954, states:

1. Paragraph 1 of plaintiff's amended petition requires no answer.

2. Defendant admits its corporate existence as alleged in paragraph 2 of plaintiff's amended complaint and denies each and every other allegation therein contained.

3. Defendant admits that at the times mentioned in plaintiff's amended complaint plaintiff was employed by defendant as a car repairman, and denies each and every other allegation in paragraph 3 of said complaint.

4. Defendant denies each and every allegation contained in paragraph 4 of plaintiff's amended complaint.

5. Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 5 of plaintiff's amended complaint.

Wherefore, having fully answered plaintiff's amended complaint, defendant prays to be hence dismissed with its costs.

6. Defendant states that whatever injuries plaintiff sustained on the occasion mentioned in his amended complaint, and whatever conditions and consequences were occasioned thereby, resulted solely from, or were caused by, plaintiff's own negligence contributing directly and proximately thereto.

Wherefore, having again fully answered plaintiff's amended complaint, defendant prays to be hence dismissed with its costs.

Wayne Ely,
St. Louis, Missouri,
Attorney for Defendant.

ABSTRACT OF TESTIMONY.

The plaintiff, Ferriel M. Barnett, of Newburg, Missouri, offered the following evidence in his own behalf:

That at the time of the accident he was 49 years old and had been employed by the defendant for 18 months (T. 53). His work required a good deal of stooping, walking, heavy lifting and general physical exertion (T. 119-121). In the accident he received a broken knee and some back injury (T. 87, 88, 90, 91, 220, 221), and he has been unable to hold a steady job since the accident (T. 121-127).

On the morning of December 29, 1950, plaintiff went to work at or about 12:30 A. M. (T. 55). His first job was to replace worn brake shoes and to make minor repairs on the Wabash Blue Bird, Train No. 24, and check the equipment for air and steam leaks (T. 56). The train usually consists of six cars but on the night of December 28, 1950, it had an extra car between the dining car No. 51 and the observation car No. 1601 (T. 12). After arriving at the station, the extra car was cut out and the remaining six cars were put on track No. 9 in defendant's Jefferson Avenue yards (T. 12, 13, 33, 56). This track runs generally east and west and there is a slight slope of two percent (T. 13, 32, 33, 56). The train was set on the track with the brakes in a locked on position (T. 32, 33) with the observation car at the easternmost end and the dining car immediately west of it (T. 13). All cars were coupled together while in operation (T. 59). All steam and air hose connections were made between the cars except the dining and observation cars (T. 60), even though there existed a rule that in cold weather steam be kept on passenger equipment at all times (T. 13, 14). This night was very cold (T. 60), about 20 degrees above zero (T. 55).

As a general rule, when one such as plaintiff goes to work all steam and air connections between the cars are

already made (T. 19, 20, 60). There was, however, some evidence that it was plaintiff's job to make these connections when they had not otherwise been made (T. 30, 136).

Plaintiff started his work by placing blocks under the wheels of the easternmost end of the easternmost car, or the observation car (T. 57). It was necessary to block the wheels to keep the train down the grade on track No. 9 (T. 57) when the brakes were released, which, in turn, was necessary in order to check the brake shoes (T. 56). After blocking the wheels of the observation car he proceeded westwardly and found that the air hoses and steam lines between the observation and dining cars were not connected (T. 57, 58, 60). In addition, he found that the coupling heads of both the air hose and steam line of car No. 1601 were covered with an ice ball about the size of a man's fist (T. 65, 68, 160). The coupling heads to the air hoses were hanging in close proximity to the open steam line (T. 70). The ice thereon was the result of condensation discharge from the open steam line (T. 66, 160). It was dark and plaintiff had only a hand battery lantern to work by (T. 65). There was no other light in the yard or on the train (T. 65). Plaintiff put the lantern on the car coupling and knocked the ice from the unconnected air hoses and hose couplings with a hammer (T. 71). He then made the connection (T. 73). He could not say positively that he knocked all the ice off as he did not afterwards closely inspect the coupling mechanism, but he thought so, as the coupling mechanism went together all right and to all external appearances the coupling appeared to be proper (T. 73, 74, 137, 138, 141-143, 160, 212). The plaintiff had no difficulty in making the connection as there was sufficient slack in the air hoses and they were not stretched tight and as all of the slack between the cars had not pulled out of the drawbars (T. 159).

After connecting the steam and air hoses between the two cars, he proceeded westwardly along the train block-

ing each car as he went (T. 68). When he arrived at the westernmost end or the head end of the train he hooked the steam line from the yard to the train so that the whole train would have steam on it (T. 61). He then went to the easternmost or rear end of the train, blocking cars as he went, and hooked the air brake hose of the train to the air line in the yards and turned it on (T. 62, 63). The purpose of this air was to operate or release the train brakes (T. 62). After that and while still at the easternmost end of the train, he drained the train of steam condensation by means of an angle cock on the train steam lines (T. 63). He shut off the angle cock and proceeded back westwardly along the right side of the train checking brake shoes as he went (T. 63). The brakes at this time were in a released position (T. 64).

As he passed the connection between the observation car and the dining car he observed a leak in the steam hose connection between these two cars (T. 65). He stepped in between the cars, holding his lantern in his left hand and pressing it against the observation car, he took his hammer in his right hand and attempted to tighten the steam line coupling, which was leaking, by hitting on the locks of the connection (T. 106, 107). It was proper procedure to try and tighten a steam leak and a steam hose connection by knocking on the clamps with a hammer (T. 36). The plaintiff could not see too well, as his only light was the hand lantern and steam was blowing out of the leaking coupling, making vision difficult (T. 56, 107, 162). While he was thus working on the steam line connection, the air hose connection separated and struck the plaintiff on the right knee (T. 107, 108). Plaintiff was dazed by the blow and remembers only when he found himself on his back across a rail backwards from his previous position (T. 108).

Mr. McCauley, plaintiff's gang leader foreman (T. 31), was working at the east end of the observation car at the

time plaintiff was injured at the west end of the observation car. He heard the plaintiff, Barnett, holler and at the same time heard the train brakes go into emergency (T. 20). At the time of the injury the brakes went into a full on-position (T. 21). McCauley went to where the plaintiff was injured, noticed that the air hoses were separated and that there was a small leak in the steam heat connection between the cars (T. 34). Shortly thereafter, plaintiff was taken to the Missouri Pacific Hospital (T. 110).

The defendant introduced evidence that there had been a leak in the air hose connection (T. 259, 268), and that the plaintiff had in fact attempted to correct this by hitting on it with a hammer (T. 268). In cross-examining plaintiff, the defendant introduced plaintiff's prior statements to the effect that there had been an air leak and that he had attempted to correct it by hitting on the air hose connection with a hammer. These were in a statement to defendant's Claim Agent Bittle and from testimony at the two prior trials. Plaintiff did not recall making any such statements (T. 148, 149, 164, 171, 172, 197, 198, 199), nor did he remember making a statement to Bittle or at the previous two trials that he did not know whether he hit the air hose coupling with a hammer (T. 192, 197, 198, 199, 205, 206, 207). He did not remember making any statement at the prior two trials that a sudden jerk of the observation car when the brakes were released was the cause of the hoses separating (T. 186, 187, 191).

McCauley did not remember plaintiff stating to him that plaintiff had struck the air hose coupling with a hammer (T. 259, 260, 262, 266). Plaintiff does not remember making any statement to McCauley on the cause of the accident (T. 168, 169). McCauley, however, recalls a conversation had just previous to his testimony between himself, Mr. Martin, Mr. Froehlich, Mr. Schimmers, and coun-

sel for the defendant, in which he was asked whether or not plaintiff had hit the air hose with a hammer, the witness at the time answering "yes" (T. 266, 267).

Plaintiff introduced Exhibits A, B and C, which are photographs showing the air and steam connections and the hoses which are customarily found on passenger equipment (T. 8). Exhibit A shows the air and steam hoses disconnected (T. 9). Exhibit B shows the disconnected lines as they appear when two cars are sitting together (T. 9). Exhibit C shows the connection between two cars after made (T. 9). On these exhibits the inked-in letter "A" indicates air hoses and the letter "S" indicates the steam hose (T. 36). The line involved in this case is the one marked with the letter "A." The remaining unmarked line, which is not here involved, is known as the train signal line and is also an air line (T. 39, 40).

McCauley, called as a witness for both plaintiff and defendant, had worked as a Car Inspector for the Terminal Railroad for eight years (T. 4, 5). He had some 30 years' experience with air hose couplings and brakes (T. 26). He testified to the working of the air brakes, the locking mechanism of the air hose coupling and the manner in which air hoses hung between connected coupled cars. To release the brakes on passenger equipment it is necessary to introduce air pressure into the train air brake hose line. To apply the brakes it is necessary to reduce the amount of air pressure in the line (T. 6). Plaintiff had this witness identify two air hoses which he identified as being those usually found on passenger train equipment (T. 9, 10). The witness explained the locking mechanism of the air hose coupling heads. On the under side of each head of the air hose coupling there exists a small stop pin, which keeps the hose from falling through in a vertical direction after they have once been connected. When the train is operating on the road the heads of the coupling rest against the stop pin, thus keeping the heads from

separating (T. 16). On each head of the coupling end of the air hose at the outermost extension exists a protrusion called a "lip" on which there is a tongue and groove arrangement. As the hoses are coupled together these tongue and groove arrangements mesh with a similar arrangement found on the back side of the coupling head, thus keeping the hoses from separating in a lateral plane (T. 17). The only way a hose can be separated when once properly put together and locked is to lift it to an almost level position so that the two locking mechanisms disengage (T. 18, 23). If, however, the tongue and groove arrangement were destroyed by wearing or some other method, the hose connection would be apt to separate under pressure (T. 218, 219, 223).

When air hoses are connected up between cars there is a certain amount of slack in them, allowing them to bounce around, to take the rough riding, when the train is in operation. The slack keeps the locking mechanism in place and allows the hose to swing around without separating (T. 10, 11). If the drawbars of the train are in first-class shape, and there is little wear in them so that there is very little slack action or play in the drawbars, with all of the slack pulled out of the drawbars there will remain a certain amount of slack in the air hoses so that the train may operate on the road without the hoses separating (T. 42, 43). The cars involved in this train, the Blue Bird, were relatively new. There was little or no wearing in the drawbars so that the slack action was very slight (T. 43, 44, 269, 270). Thus, there would be very little stretching of the air hoses when connected (T. 43). Under these conditions, with the air hoses properly connected, and with the operating amount of slack in them, if one were to hit the air hoses with a hammer the hoses would not separate (T. 44). An inspection of the air hoses here involved by several persons at varying periods after the accident revealed that the hoses were mechanically perfect

and functioned as they should (T. 41, 269, 272, 281, 283, 284).

The plaintiff admitted on cross-examination that the statement, Defendant's Exhibit 1, had plaintiff's initials on seven of the eight pages (T. 50, 51), and that the statement was signed on the eighth page in the plaintiff's handwriting (T. 151). Plaintiff did not remember Mr. Bittle coming to the hospital and taking such a statement from him (T. 149, 151, 168, 169, 171, 172). Plaintiff did not remember giving any testimony at the first trial to the effect that he had given a statement of this sort (T. 177-180). Defendant put Mr. Bittle on the stand and had him identify the above-mentioned statement as the one taken by the witness from the plaintiff on January 9, 1951, at the Missouri Pacific Employees' Hospital (T. 239, 240, 241). The witness testified that the plaintiff had initialed each and every page and signed the following one after reading it (T. 241).

Defendant introduced into evidence a photostatic copy of plaintiff's claim for disability benefits to the Providence Life and Casualty Insurance Company (T. 249). The claim is as follows: Policy No. 139-1466; employed by Terminal RR; name of foreman and superintendent, L. W. Martin; employed as Car Man; your occupation, it says, Car Man; (1) Accident occurred, 12/29; date last worked, 12/29/50, a. m. 1:30; (2) State what injury or circumstance caused your disability, it is written in there, broken right knee cap; (3) Refers to sickness, not answered; (4) If injury, explain fully how and where accident occurred, 12/29, 1:30 a. m., making air hose connection, connection parted and air hose struck me on knee; signed as the witness said by himself (T. 249).

The plaintiff admitted making this claim (T. 209) and that his signature appears thereon (T. 209, 210). Defendant also introduced into evidence plaintiff's original peti-

tion, Paragraphs 5 and 6 (T. 250-254), and plaintiff's second amended petition (T. 255).

At the close of the plaintiff's case plaintiff recalled witness McCauley to the stand and the following occurred:

Counsel handed the witness an air hose and told him to carefully consider the head and notice that at the tongue and groove arrangement the groove had been largely filled in with a metal (T. 234):

"Q. Now I believe on this one that you are holding that the part where I have marked in chalk in both instances here those grooves have to a large degree been filled in with metal?

"A. Yes, sir.

"Q. Is that not correct?

"A. That is correct.

"Q. And other than that it is just the same? (T. 234.)

"Mr. Ely: It is what?

"Mr. Fredrickson: It is just the same as any other air hose coupling.

"Q. (By Mr. Fredrickson) That there is a weld in there of metal, is that correct?

"A. Yes, sir" (T. 235).

The witness then stated that even with the weld placed in the tongue and groove arrangement, the air hoses would still work; in every respect the coupling then made looked as if it was proper and correct; yet the coupling would readily slide apart (T. 235). If there were ice or any foreign substance in the tongue and groove arrangement it would destroy the locking mechanism (T. 236).

Counsel for defendant then cross-examined:

"Q. Now, if they are put together like Mr. Fredrickson shows here a while ago then that would make a

leak in the air hose, wouldn't it, if you put on pressure?

"A. No, sir, the way he had them just now would not make a leak in the air hose, but if those are obstructed like he showed being tapped slightly would cause them to bust apart.

"Q. (By the Court) It would or would not?

"A. It would.

"Q. (By Mr. Ely) It would. If they are put together like he showed you there, then to tap with a hammer, if it had pressure in there would cause them to break apart?

"A. If this one head was obstructed or defective, it would cause that.

"Q. That is if they were put together like he had them put together a while ago?

"A. A while ago" (T. 237).

The witness then went on to testify that the heads of the air hoses as demonstrated by plaintiff's counsel on direct examination put them in a triggered condition and they would go off at the slightest little jar or happening (T. 238).

Defendant's counsel then recross-examined:

"Q. And the way he had it put together then was not properly put together, was it?

"A. It was properly put together, but it was defected.

"Q. It was not locked?

"A. It could not be locked under the circumstances.

"Q. This is not the same hose, of course, you had that night?

"A. No.

"Q. Is this a defective coupling on this hose here?

"A. That would be a defective coupling.

"Mr. Fredrickson: Sure.

"Mr. Ely: That is all.

"Mr. Fredrickson: I have no further questions" (T. 238).

A day after the close of the entire case, a proceeding was held in the judge's chambers in which defendant for the first time questioned the above quoted evidence (T. 287, 288, 289). The case was reopened by stipulation of counsel (T. 294, 295) and Mr. Fredrickson, counsel for plaintiff, was put on the stand and was examined about the defective air hose used by McCauley in the above testimony. At the close of this examination, defendant for the first time objected to the demonstration (T. 301, 302):

> "Mr. Ely: Now, if Your Honor please, I am going to ask Your Honor to withdraw the welded air hose from consideration of the jury, withdraw it from evidence in the case and to instruct the jury to disregard it entirely and to entirely disregard any demonstration that was made with it because there is no evidence in this case that would justify its admission into evidence. There is no evidence in this case that the hose which was involved in this accident had any such weld in it, or had any ice in there where the weld is and because Your Honor would judicially notice that the presence of ice of the thickness of this weld would not have the same effect on preventing a coupling as this putting of the metal in there is. I will ask Your Honor to take that away from the jury's consideration."

The objection was sustained as follows (T. 303):

> "The Court: The jury is instructed to disregard everything considering that welded——
>
> "Mr. Ely: Air coupling.
>
> "The Court: Air coupling as exhibited to them when the witness McCauley on the witness stand the last

time, it will be withdrawn from your consideration and you will disregard it.

"Mr. Ely: That is all, Your Honor."

This cause was submited to the jury and upon their failure to agree, the jury was discharged.

During the trial of the cause the defendant had moved for a directed verdict in its favor. The Court reserved its ruling and thereafter on June 3, 1955, made the following order:

ORDER OF COURT.

The Court, having before it the defendant's motion for judgment in accordance with its motion for directed verdict, and having examined said motion, studied the briefs of the parties, and being fully advised in the premises, Doth Order that said motion be and the same is hereby sustained and that judgment be entered for defendant, at plaintiff's costs.

Dated this 3rd day of June, 1955.

(Signed) Geo. H. Moore,
United States District Judge.

NOTICE OF APPEAL.

Notice is hereby given that Ferriel M. Barnett, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the 8th Circuit, from the order sustaining Defendant's motion for a directed verdict and from the judgment entered for defendant in this action on the 3rd day of June, 1955.

Haley, Fredrickson, & Caruthers,
By Edward Fredrickson,
St. Louis, Missouri,
Attorneys for Plaintiff.

The cause was argued in the United States Court of Appeals for the Eighth Circuit and the following opinion was handed down:

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,413.

Ferriel M. Barnett, Appellant,
vs.
Terminal Railroad Association of St. Louis, a Corporation, Appellee.

Appeal from the District Court of the United State for the Eastern District of Missouri.

[January 17, 1956.]

Robert W. Gilcrest (Haley, Fredrickson & Caruthers were with him on the brief), for Appellant.

Wayne Ely for Appellee.

Before Gardner, Chief Judge, and Woodrough and Vogel, Circuit Judges.

Gardner, Chief Judge.

This was an action brought by appellant to recover damages for injuries suffered by him while in the employ of appellee. We shall refer to appellant as plaintiff and to appellee as defendant. The defendant is a railway corpora-

tion operating as a common carrier in interstate commerce and at all times pertinent to this action was the owner and operator of the terminal facilities at St. Louis, Missouri, for all common carriers operating into, through or out of that city.

At the time of receiving his injuries plaintiff was employed by the defendant as a car inspector and repairman in its railroad yards at St. Louis, Missouri. The case has been tried three times. On the third and last trial plaintiff filed an amended complaint which in substance charged as acts of negligence as the basis for recovery that on December 29, 1950, plaintiff was engaged in the course of his employment by defendant in inspecting brake shoes and making an air test on passenger cars of the Wabash Railroad Company which other employees of the defendant had previously placed in the coach yard and were subsequently to remove and that the defendant negligently allowed and permitted the air brake hose and the steam pipe on each of two of said cars to remain uncoupled and in a position where steam was escaping from the steam pipe between the cars at a time when the weather was below freezing and as a direct result of such negligence ice formed in and upon the couplers of the air hose and wholly or partly as a result thereof plaintiff was unable to make a secure coupling of the air hose by reason of the existence of ice in and on such coupling so that they burst apart, struck and injured plaintiff. This complaint was an amended and substituted complaint in that it did not by reference or otherwise embody the allegations of the complaint as originally filed. The defendant by its answer denied each and every allegation of the amended complaint except as admitted and it admitted the jurisdictional allegations, admitted that at the time of receiving his injuries plaintiff was in its employ as a car repairman but denied that it was guilty of any negligence and affirmatively pleaded that whatever injuries plaintiff sustained on the occasion mentioned in his

amended complaint resulted solely from or were caused by plaintiff's own negligence.

At the time of the accident resulting in plaintiff's injuries plaintiff was an experienced machinist having been employed by the St. Louis-San Francisco Railway Company for thirty years and by the defendant for some eighteen months. On the day of the accident he began working at 12:30 a. m. His first job was to replace worn brake shoes and to make minor repairs on the Wabash Blue Bird passenger train and check the equipment for air and steam leaks. This Blue Bird train when it arrived in the yards at St. Louis was carrying an extra car between the dining car and the observation car. Prior to the time plaintiff inspected the train this extra car had been cut out and the cars had been recoupled. The hose connecting the air brake line and the hose connecting the steam line had, however, not been connected and there was escaping steam from the disconnected end of the steam line hose. The temperature stood at about twenty degrees above zero and there was ice accumulated on the coupling heads of each of these disconnected hose. Plaintiff in discharge of his duty as a car inspector and repairman entered between the cars where the hose were disconnected and exposed and with his hammer knocked the ice off the head of each of these exposed hose and connected each with the hose of the car immediately ahead of it. After connecting the steam hose and air brake hose between the two cars he proceeded westwardly along the train blocking each car as he went and when he arrived at the westernmost end or the head end of the train he hooked the steam line from the yard to the train so that the whole train would have steam on it. He then went to the easternmost or rear end of the train blocking cars as he went and hooked the air brake hose of the train to the air line in the yards and turned on 110 pounds of air pressure. He then returned to the space between the dining and observation car and observed a leak in the steam hose connec-

tion between these two cars. While he was attempting to tighten the steam line coupling which was leaking the air brake hose connection separated striking him on the knee.

The facts will be further developed in the course of this opinion. At the close of all the evidence defendant moved for a directed verdict on the following grounds: (1) That the evidence was not sufficient to sustain any allegation of plaintiff's complaint against defendant; (2) That the evidence fails to establish any violation of the Safety Appliance Act; (3) That the evidence fails to establish that the air hose coupling came apart by reason of any negligence on the part of defendant; (4) That the evidence proves that the air hose coupling came apart solely by reason of plaintiff's negligence; and (5) That the evidence proves that plaintiff failed to put the air hose coupling together properly and securely and that he knocked it apart with a hammer. The court deferred passing on the motion for a directed verdict and sent the case to the jury. The instructions are not to be found in the record before us and, hence, will be assumed to be correct in every respect. The jury failed to agree and was in due course discharged. Thereafter defendant made a motion for judgment in accordance with its motion for directed verdict. The court granted defendant's motion and entered judgment dismissing plaintiff's complaint on its merits and from the judgment so entered plaintiff prosecutes this appeal seeking reversal on substantially the following grounds: (1) The court erred in directing a verdict for the defendant and entering judgment for the defendant and dismissing plaintiff's complaint upon its merits. There was substantial evidence to support the hypothesis that defendant negligently set cars in its yards in cold weather with the air and steam lines disconnected so that ice formed on the air brake hose coupling causing it to burst apart and injure the plaintiff; and (2) The court erroneously excluded from the case certain evidence adduced by plaintiff and establishing that ice in the

locking mecha ism of the air brake hose would cause it to burst apart un ler pressure.

We shall fir t consider the action of the court in withdrawing from he jury's consideration a piece of hose and testimony wit reference thereto, the hose not having been introduced in vidence. In the course of the trial plaintiff called one Mc auley as a witness who testified with reference to the tw pieces of hose that had been introduced in evidence. He testified with reference to these hose, using them by way o illustration, that the hose was in two parts, each part bein equipped with a "head", with a "lip" on one head and groove on the other and the coupler of the hose was lock d together by fitting the lip into the groove. Plaintiff's cou sel marked the lip and groove of the coupler with chalk an the witness put them together and explained to the jury tha the locking of the coupler by fitting the lip into the groov would prevent the heads from pulling apart on lateral mo ement and further testified that if the coupler "was wor to the point that there was no tongue-and-groove left, o if the head of the hose is spread apart in some way, th n it would pull apart." After having been excused the w tness was recalled as plaintiff's last witness. When recalle counsel for plaintiff produced a piece of hose similar in ap earance to the two pieces of hose that had been introduc d in evidence and interrogated the witness with referenc thereto. He did not announce to the court nor to opposi g counsel that the hose so produced was not one of the pie es of hose already admitted in evidence. Ordinarily the nly testimony admissible with reference to this piece of ose would have been testimony for the purpose of layin a foundation for its admission in evidence. It is elementa y that a witness may not be interrogated with reference to a physical exhibit which has not been admitted in evidence a d it is perfectly manifest on the record that neither the c urt nor opposing counsel knew that this so-called exhibi had not been previously admitted in evidence.

This physical exhibit though entirely foreign to the record was exhibited to the witness and to the jury and it was shown that there was in the groove an obstruction consisting of certain metal and the witness was interrogated with reference to the effect the presence of such a substance might have in making a secure coupling. Following the closing of the testimony counsel for defendant in the court's chambers made known to the court that this piece of hose was not one of the pieces that had been introduced in evidence and contended that it had been improperly used for demonstration purposes. The case was thereupon reopened and defendant's motion to strike all evidence that had been introduced with reference to this piece of hose was sustained. Plaintiff did not attempt to reoffer any part of the testimony so stricken. In support of its motion to withdraw the exhibit from consideration of the jury and to strike the testimony with reference thereto counsel for plaintiff was called as a witness and, among other things, testified that when he first called Mr. McCauley to the stand he made use of two certain couplers or two pieces of air hose in making certain demonstrations and that when he called Mr. McCauley back to the stand he produced one of those two original pieces and a third and different piece of air hose which he used for another demonstration; that the third piece of air hose had not previously been used in the case; that when he produced the third hose he did not announce that it was a different one; that the flange on the lip of the third air hose had been filled in with metal at his direction; that before using it he did not advise the court nor opposing counsel that it was a different air hose from the one he had been using; that he picked it up from the floor under the table and that "I did not make any statement to you or His Honor, or to Mr. McCauley or to the jury, or anyone, that I have a third air hose here"; that in having the lip of one connection filled with metal, "I acted upon my own suggestion." The locking mechanism in the third piece of hose had been so altered by inserting a foreign piece of

metal therein as to render it ineffective and wholly unlike the actual condition of a normal locking mechanism. We think the court on its own motion would certainly have been warranted in taking the action which it did. The third piece of hose in its altered condition would certainly be deceptive and misleading. 32 C. J. S., Evidence, Sec. 607, p. 457. The evidence was not properly admissible but this was not made to appear until subsequent to the time it was offered and in such circumstances it was proper upon motion subsequently made to strike it from the record. **Specht v. Howard**, 83 U. S. 348.

To entitle a plaintiff to recover in an action brought under the provisions of the Federal Employers' Liability Act the burden of proof is upon him to prove the carrier guilty of negligence and that such negligence was the proximate cause in whole or in part of his injuries. **Wolfe v. Henwood**, 8 Cir., 162 F. 2d 998; **Tennant v. Peoria & P. U. Ry. Co.**, 321 U. S. 29; **Brady v. Southern Ry. Co.**, 320 U. S. 476. It was the theory of the plaintiff on this third trial that the coupling of the air brake hose, although apparently made, parted because of the presence of ice on the inside of the coupler. In this connection it is to be observed that at two previous trials no such contention was urged. On the first trial he attributed the separation of the coupling to a sudden jerk of the train. In his signed statement made at the hospital following the accident he said that the air hose coupling came apart when he tapped it with a hammer and it was not until the third trial that any claim of negligence was based on the fact that the defendant in removing the car that had been transported between the observation and dining cars had negligently failed to connect the air brake hose and the steam hose with the car immediately in front of it. Plaintiff admits in his testimony that as a car inspector and repairman it was his duty to remove the ice that had accumulated on the coupling ends of the steam hose and the air brake hose and he testified that in dis-

charge of this duty he did remove this ice. Touching this phase of the case he, among other things, testified on direct examination that before he coupled the air brake hose together there was ice on the coupling that "was piled up there, kind of mushroom-like * * * right on that end there where the connection is"; that the pile of ice was "as big as your fist, or bigger," and "covered that head on the air hose"; that he took his hammer and knocked it off and hooked them together; that he had his hammer in his right hand and a lantern in his left hand and that he lay the lantern on the side of the car to keep from hitting it with the hose; that he took hold of the hose and hit it with his hammer about twice, "just enough to knock the ice off of it"; and that he coupled the air hose together and "beat the ice off the steam heat line" and hooked it together. On cross-examination, among other things, he testified that he knocked the ice off; that he didn't know for sure whether he knocked it all off because he didn't inspect it but just placed the couplers together; that it was his job to knock the ice off and that "You have to knock it off to make a coupling if you got ice on"; that when he put the couplings together "they went down and locked, just like they usually do, routine work, work every night on it. * * * they buckled and dropped down like that there, that is what we go by"; that the ice which he knocked off had formed on one coupler head from the condensation which came from the steam line but that he knocked it off with his hammer; that after he knocked the ice off and coupled the hose he "just picked it up and hit it like that there and laced them together and they went together all right; that there wasn't anything he could notice to keep them from going together; that the couplers "would not go plumb down together if there was any ice in here," and that when he put them together he did not notice anything wrong with them; that there is an interlocking device consisting of a groove on one coupler head and a lock washer on the other; that the groove or flange is about a quarter inch deep and

that the lock washer fits into it; that he thought it coupled all right and that if there had been anything in there such as ice or anything else it could not have gone together and coupled. The steam or moisture which condensed on this coupler came from the steam line hose. There was no moisture passing through this air brake hose. After the ice had been removed from the couplers and the coupling had been made plaintiff turned on 110 pounds of air pressure to pass through this air brake hose coupler. When he returned to the couplers in question it was not claimed that he noted anything wrong with the air brake hose coupler but that the steam line hose coupler was leaking and it was in connection with his attempt to cure the steam hose leak that the air brake hose coupler burst apart. In this connection it is to be noted that plaintiff in his written statement as to how the accident occurred stated that the air hose came apart after he struck it with his hammer. It was not until the third trial of this case that he testified that it came apart when he struck the steam hose with his hammer. It is also to be noted in this connection that plaintiff alone testified as to the presence of ice on these hose couplers and as to the manner in which the accident is alleged to have happened. Such of his statements and testimony as is against his interest is presumed to be true and in these circumstances the rule as to directing a verdict may be stated as follows: Where a party's own testimony, if true, would defeat his right to a verdict, and such statements are not modified or explained, a verdict may be directed against him. **Harlow v. Leclair**, N. H., 136 A. 128; **Nicolai-Neppach Co. v. Smith**, Ore., 58 P. 2d 1016; **Mandell v. Dodge-Freedman Poultry Co.**, N. H., 45 A. 2d 577. There was no evidence whatever that there was any ice on the interior of this coupler and no testimony from which a jury could reasonably infer that the hose burst or came apart because of the presence of ice in the interior of the coupler. Such inference could be based only upon conjecture, possibility, speculation or guess. In such circum-

stances it cannot be said that there is substantial evidence sustaining plaintiff's contention and, hence, as a matter of law plaintiff was not entitled to recover. **Wilkerson v. McCarthy,** 336 U. S. 53; **Moore v. Chesapeake & O. R. Co.,** 340 U. S. 573; **Penna. R. Co. v. Chamberlain,** 288 U. S. 333.

But we think the evidence is insufficient to sustain a verdict for plaintiff for another reason. This plaintiff was according to his testimony a car inspector and repairman. As such it was his duty to make such repairs on these hose as was necessary to allow them to couple safely. This mechanism, it may be said, was in bad repair when he went on duty and it was his job, and his alone, to make the necessary repairs. There is no claim that during the time he was making the repairs the defendant failed to furnish him with proper tools or failed to furnish him with a reasonably safe place to make the repairs or actively did anything that resulted in his injuries. A mechanic could not, we think, be heard to complain that it was the negligence of his employer that caused the mechanism to get out of repair. It might be said that there would be no occasion for the mechanic to perform any duty if the mechanism were not out of repair. By analogy we may consider the case of an automobile mechanic. The owner of a car through his own negligence has had a collision resulting in damage to the car. The mechanic is called to repair it. If injured in so doing he certainly could not attribute the original negligence of the owner of the car as the proximate cause of his injury. So in the instant case if there was any negligence on behalf of the defendant in failing to connect up the hose in controversy earlier than it did that would not be the proximate cause but would simply furnish the opportunity for the infliction of injuries. **Fraser v. Chicago, R. I. & P. Ry. Co.,** Kan., 165 P. 831. If there was ice on the inside of this coupler, and we have pointed out that there is no evidence that there was, that was because plaintiff did not remove it and his negligence in failing so to do would be the sole

proximate cause of the accident. **Chicago, St. P., M. & O. R. Co. v. Arnold,** 8 Cir., 160 F. 2d 1002; **Louisville & N. R. Co. v. Davis,** 6 Cir., 75 F. 2d 849; **Pere Marquette Ry. Co. v. Haskins,** 6 Cir., 62 F. 2d 806. While contributory negligence is not a defense to an action brought under the Federal Employers' Liability Act yet where the negligence is that of the employee alone there can be no recovery. In **Chicago, St. P., M. & O. R. Co. v. Arnold,** supra, this court approved as proper an instruction that "if the jury found that the plaintiff was guilty of negligence and 'that his negligence was the sole proximate cause of the accident and his injuries' the verdict should be for the defendant."

The claim that this court in the first appeal in this case, **Barnett v. Terminal Railroad Assn. of St. Louis,** 200 F. 2d 893, held that the defendant might be found guilty of actionable negligence because it had failed to connect the hose between the dining and observation cars is wholly without merit. That question was not before the court and the court was merely emphasizing the wisdom of the precautionary procedure of deferring passing upon motion for directed verdict until after the case had been submitted to the jury.

We have given careful consideration to all the other contentions urged by plaintiff on this appeal and are of the view that they are wholly without merit. The judgment appealed from is therefore affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

On the previous appeal in this cause the United States Court of Appeals for the Eighth Circuit handed down the following opinion:

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 14,692.

Ferriel M. Barnett, Appellant, vs. Terminal Railroad Association of St. Louis, a corporation, Appellee.	Appeal from the United States District Court for the Eastern District of Missouri.

[January 16, 1953.]

Forrest Boecker for Appellant.

Wayne Ely (Joseph H. Miller and Richard B. Elster were with him on the brief) for Appellee.

Before Sanborn, Riddick and Collet, Circuit Judges.

Sanborn, Circuit Judge.

Ferriel M. Barnett, a car inspector and repairman employed by the Terminal Railroad Association of St. Louis, an interstate carrier, was injured on December 29, 1950, when he was struck on one knee by the end of an air hose coupling which suddenly came apart. He brought this action under the Federal Employers' Liability Act, 45

U. S. C. A., §§ 51 et seq., for damages, upon the claim that the accident and his injuries were caused by the negligence of the defendant (appellee). The defendant denied liability.

The case has been tried twice. On the first trial the jury disagreed. Before the case was set for retrial the plaintiff moved for leave to dismiss without prejudice. The District Court denied the motion upon the ground that it would be unfair to the defendant to permit such a dismissal without requiring the plaintiff to pay the expenses and reasonable attorneys' fees incurred by the defendant, and that it appeared that the plaintiff could not pay such expenses and fees.

The case was again tried to a jury. At the close of the plaintiff's evidence the defendant moved for a directed verdict in its favor on the ground that the evidence failed to show that the accident was due to any negligence on its part. The motion was granted and the plaintiff appealed from the ensuing judgment.

Two questions are presented for review: (1) Did the court err in denying the plaintiff leave to dismiss his action without prejudice? (2) Did the court err in directing a verdict at the close of the plaintiff's evidence?

The first of these questions must be answered in the negative. Under Rule 41 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. A., a plaintiff, after answer has been served, has no absolute or unqualified right to dismiss his action without prejudice. **Home Owners' Loan Corporation v. Huffman**, 8 Cir., 134 F. 2d 314, 318. A District Court, in the exercise of a sound judicial discretion, may, as a condition for permitting a plaintiff to dismiss without prejudice after an answer has been filed, require him to pay the expenses and reasonable attorneys' fees incurred by the defendant. **New York, C. & St. L. R. Co. v. Vardaman**, 8 Cir., 181 F. 2d 769, 771, and cases cited.

The second question is more difficult. The plaintiff in his complaint alleged that on December 29, 1950, he was inspecting brake shoes and making an air test on certain passenger cars in the defendant's yards in St. Louis, Missouri, and that while he was tightening a steam hose coupling between two of these cars the air hose coupling between the cars burst apart, striking and injuring him. The plaintiff charged that the defendant was guilty of actionable negligence (1) in requiring him to work between cars so situated that the air hose coupling was likely to burst apart when the air pressure was turned on; (2) in assuring him that the place he was working was safe, when it was not safe; (3) in failing to provide means for releasing the air pressure in the coupling while he was working near it; (4) in failing to furnish sufficient personnel safely to perform the duties required of the plaintiff; (5) in failing to instruct him as to how to perform his duties safely; (6) in applying excessive and dangerous air pressure to the coupling which burst apart; (7) in failing to provide adequate means to inspect the equipment and to discover and replace defective equipment; and (8) in failing to guard against the likelihood of an internal explosion in the air hose.

The only evidence at the trial bearing on the issue of liability was that of the plaintiff himself. His testimony showed that he was fifty-one years of age; that he had been a machinist and a railroad man for about thirty-eight years; that he started to work for the defendant in August, 1948, as a car inspector and car repairman; that on December 29, 1950, his working hours were from 12:30 A. M. to 8:30 A. M.; that for two days each week the main part of his work was stopping air leaks and steam-heat leaks, and putting brake shoes on cars; that on other days he worked on the repair track, repairing cars and making necessary replacements, and in the yards and at the Union Station in St. Louis doing similar work.

The plaintiff's evidence relative to what occurred on December 29, 1950, was that he went out in the defendant's yards to Wabash No. 24, a train of six streamlined passenger cars, also known as the Blue Bird; that the six cars were coupled together with their air brakes set and were on Track No. 9, which runs east and west and slopes "quite a bit" toward the east; that he put blocks under the wheels of the cars to keep them from rolling when the brakes were released; that the brakes are released in repairing the train; that the blocks are made of crossties and are about ten or twelve inches long; that they are laid crossways over the rail and under the wheels; that generally one block is laid under the rear wheel of each car on one side of the train; that he found that all of the steam, air and signal lines of the train were connected except between the last two cars at the east end of the train; that the last car was an observation car, No. 1601, and the car next to it a diner, car No. 51; that the air hose connection of the diner had ice all over it; that the coating of ice was "a whole lot bigger" than the head of the air hose coupling; that in coupling up the air hose he beat the ice off of it and then made the coupling; that he also coupled up the steam heat hose and the signal line between the two cars; that after doing that he connected a steam line located in the yard near the west or head end of the train to the steam line of the train at that end, and connected the air line of the train with the compressed air line in the yard at the rear or east end of the train; that there were two compressed air lines in the yard, a high pressure line and a low pressure line; that the low pressure line was broken down and could not be used; that the pressure in the high pressure line was around 180 pounds; that after putting on the air the plaintiff started to go around the train; that he found a steam heat leak between cars Nos. 1601 and 51, the two rear cars of the train; that "the steam had blown plumb out through the top of the train" by the time he got there; that he tapped on the steam heat coupling with his hammer to close

the leak; that there was so much steam blowing out that he was unable to tell whether or not there was also a leak in the air hose coupling.

The plaintiff testified that while he was working to tighten the steam heat connection, the rear car moved about five inches all of a sudden; that the air hose coupling came apart and hit him across the leg and he fell down; that he did not know whether he hit the air hose coupling with his hammer or not; that he had noticed that the air hose coupler on car 51, the diner, had a gasket in it that was worn "a little bit," but which he felt did not need replacement; that if he had hit the air hose coupler on top with his hammer it would have had no effect on it; that after he had knocked the ice off the one end of the coupler he noticed nothing wrong with it; that it was three or four minutes after he had put the air in the train-line before the accident happened; and that a jar might knock the coupler apart.

Upon being asked what he thought caused the air hose coupling to separate, the plaintiff said that he could not tell "unless when that car [the rear car] moved it jerked it [the air hose coupling] apart." He said further that he figured that "the slack in the car is what made the car jump over the lock of wood" when the brakes released; that he thought it was the sudden movement of the car that jerked the air hose coupling apart; that if the coupler was put together properly it would lock, but a sudden jar from the movement of the train, or striking the coupler with a hammer, might knock the coupler loose; that the proper and only safe way to tighten such a coupling is to shut the angle cock between the cars and cut off the air, and that he knew that long before the accident; that when he coupled up the air hose he thought the slack was out of the coupler which held the cars together; that in order to couple the air hose he had had to pull to get the ends together; and that when the hose is slack the slack between the cars is bunched.

The plaintiff testified that while he was hitting the steam heat hose he might have tapped the air hose coupling; and, also, that he figured that ice on the air hose coupling and the hose being stretched out caused the air leak, although he thought he got the ice all off before making the coupling.

It appears that after the accident the plaintiff while in the hospital gave a statement to one of the agents of the defendant to the effect that he had discovered an air leak in the air hose coupling between the two last cars of the train, that he had tapped the coupler with his hammer in order to tighten it, and that it came apart. At the trial the plaintiff testified that he had no recollection of making such a statement, and that his physical condition, when the statement was taken, was such that about half of the time he did not know what he was doing.

It is apparent that the plaintiff's evidence made a rather unsatisfactory case on the issue of liability. He points to no specific act or omission of the defendant indicating that there was a lack of due care on its part. On this appeal, however, the plaintiff is entitled to the benefit of every inference which reasonably can be drawn from the evidence viewed in the light most favorable to him. **Hoyt v. Clancey**, 8 Cir., 180 F. 2d 152, 154, and cases cited.

In **Wilkerson v. McCarthy**, 336 U. S. 53, 61, the Supreme Court said:

"Much of respondents' argument here is devoted to the proposition that the Federal Act [Federal Employers' Liability Act] does not make the railroad an absolute insurer against personal injury damages suffered by its employees. That proposition is correct, since the Act imposes liability only for negligent injuries. Cf. **Coray v. Southern Pac. Co.**, 335 U. S. 520. But the issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same cir-

cumstances. And a jury should hold a master 'liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances,' bearing in mind that 'the standard of care must be commensurate to the dangers of the business.' **Tiller v. Atlantic C. L. R. Co.**, 318 U. S. 54, 67."

The court also said in that case (page 63 of 336 U. S.):

"In reaching its conclusion as to negligence, a jury is frequently called upon to consider many separate strands of circumstances, and from these circumstances to draw its ultimate conclusion on the issue of negligence. Here there are many arguments that could have been presented to the jury in an effort to persuade it that the railroad's conduct was not negligent, and many counter arguments which might have persuaded the jury that the railroad was negligent."

It is safe to say that in a case such as the one before us, it is unwise for a trial judge to direct a verdict at the close of the plaintiff's evidence. We think that, even though the trial court is of the opinion that the evidence will not support a verdict for the plaintiff, the court should ordinarily reserve its ruling on a motion for a peremptory instruction until after verdict. That course will usually hasten the ultimate termination of the litigation and best serve the interests of both parties. The jury's view of the sufficiency of the evidence may coincide with that of the court. If it does not, the court, despite the verdict, can enter judgment for the defendant. An appeal from such a judgment, entered after verdict, will usually terminate the controversy one way or the other, and avoid a retrial with its resulting delay, trouble and expense and the possibility of a second appeal. Compare **Moore v. Chesapeake & Ohio Railway Co.**, 340 U. S. 573-574.

In view of the liberal rules which apply to actions brought under the Federal Employers' Liability Act, and

in view of the absence of any explanatory evidence adduced by the defendant, we think it is not inconceivable that a jury could have inferred that the last two cars of the train should have been completely coupled up when they were first set out, in order to prevent the formation of ice on the couplers of the air hose during freezing weather, or that the defendant should have furnished the plaintiff with more adequate means of removing ice from the air hose coupling or of preventing the movement of the cars on the sloping track, or with an air line in the yard with lower air pressure. This is not saying that upon a retrial of this case, when all the evidence is in, the plaintiff will have made a case for the jury. We make no predictions in that regard and go no further than to say that in our opinion the defendant was not entitled to a directed verdict at the close of the plaintiff's evidence.

We think that implications reasonably to be drawn from the cases of **Stewart v. Southern Railway Co.**, 315 U. S. 283, 285-286; **Lavender v. Kurn**, 327 U. S. 645, and **Wilkerson v. McCarthy**, supra, 336 U. S. 53, support our conclusion in this case. It is possible that the more recent case of **Moore v. Chesapeake & Ohio Railway Co.**, supra, 340 U. S. 573, 577-578, may indicate a change in the attitude of the Supreme Court with respect to the quality of proof which will sustain a verdict for the plaintiff in a case brought under the Federal Employers' Liability Act, but none of that court's former decisions dealing with the sufficiency of evidence in such cases have been disapproved by it, and we may not disregard them.

The judgment appealed from is reversed, and the case is remanded for a new trial.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Thereafter, the petitioner filed his petition for rehearing which is as follows:

PETITION OF APPELLANT FOR REHEARING.

Ferriel M. Barnett, appellant in the above entitled cause, moves the court to set aside and vacate its opinion filed in this cause on January 17, 1956, and grant appellant a rehearing, for the following reasons:

I.

The opinion is contrary to controlling decisions of the Supreme Court of the United States.

(A) The decision of the court that, "So in the instant case if there was any negligence on behalf of the defendant in failing to connect up the hose in controversy earlier than it did that would not be proximate cause but would simply furnish the opportunity for the infliction of injuries . . . If there was ice on the inside of this coupler, and we have pointed out that there is no evidence that there was, that was because plaintiff did not remove it and his negligence in failing so to do would be the sole proximate cause of the accident," is in conflict with controlling decisions of the Supreme Court which hold that negligence of the railroad and the question of proximate cause of the accident and injury are always questions of fact for the jury.

Lavender v. Kurn, 327 U. S. 645, 90 L. Ed. 916;
Ellis v. Union Pacific Railroad Co., 329 U. S. 649, 91 L. Ed. 572, 67 S. Ct. 598;
Tennant v. Peoria & Pekin Union Railway Co., 321 U. S. 29;
Wilkerson v. McCarthy, 336 U. S. 53.

(B) The opinion erroneously injects contributory negligence of the employee and assumption of risk as defenses, contrary to the provisions of 45 U. S. C. A., § 51 et seq., and the many decisions of the courts thereunder.

Tiller v. Atlantic Coast Line Railroad Company, 318 U. S. 54, 87 L. Ed. 446.

II.

The Court in its opinion filed ignores the law of the case as expressed by this court in its previous opinion.

Barnett v. Terminal Railroad Association of St. Louis, 200 F. (2d) 893.

III.

The Court in its opinion filed fails to give to the plaintiff all legitimate inferences to be drawn from the evidence, and thus brings its opinion into conflict with controlling decisions of the Supreme Court of the United States.

(A) The decision of the Court that "There was no evidence whatever that there was any ice on the interior of this coupler and no testimony from which a jury could reasonably infer that the hose burst or came apart because of the presence of ice in the interior of the coupler," is to usurp the jury's duty to draw legitimate inferences from the evidence, and to substitute the Court's opinion as the inference to be drawn, thus failing to give to the plaintiff all reasonable and favorable inferences to be drawn from the evidence, contrary to controlling decisions.

Lavender v. Kurn, supra;
Ellis v. Union Pacific Railroad Co., supra;
Barnett v. Terminal Railroad Association of St. Louis, supra.

I.

(A) In the case of Lavender v. Kurn, 327 U. S., at 653, the Court said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference . . ."

The Court proceeds on in the above quotation to point out that if there is any evidence from which the jury may draw the inference of negligence as the proximate cause of injury, then the case must be presented to the jury, and it matters not that the appellate court or the trial judge may draw a different inference than the one drawn by the jury.

More particularly the Court in its opinion states that there is no evidence from which it might be inferred that there was any ice on the interior of this coupler and no evidence from which a jury could infer that the hose came apart because of the presence of ice in the interior of the coupler.

We respectfully request that the Court examine page 7 of appellant's brief where reference is made to pages 73, 74, 137, 138, 141-143, 160 and 212 of the transcript, wherein it is shown that appellant was not sure whether he had knocked all of the ice out of the interior of the coupling. He thought he had, but he did not examine the coupling very thoroughly. Mr. McCauley who was called as a witness by both parties said that if the tongue and groove arrangement of the coupler were destroyed by wearing or

some other method, the hose connection would be apt to separate under pressure (T. 218, 219, 223). This witness further stated that ice or any foreign substance in the tongue and groove arrangement, would destroy the locking mechanism (T. 236). But they would appear to be closed and locked. Now, it is true the Court struck the testimony concerning the demonstration of the coupling partially filled with metal, but nothing is said concerning the above expression of opinion and apparently it stands as evidence in this case. Even if it be said that this evidence has been stricken, there is still sufficient evidence from which the jury could infer that any foreign substance such as ice would cause the locking mechanism to appear to be in good order when actually it would be defective.

Then, it virtually stands conceded that the defendant was negligent in leaving the steam and air lines uncoupled in view of the existing weather conditions.

We admit that a jury would not be forced to draw the inference that some ice remained in the air hose coupler. But the point is that it might and reasonably could, and if it had this Court would be bound by that finding. To such effect is the ruling of the Lavender, Ellis, Tennant and Wilkerson cases, supra. The opinion here says that such finding would have no support in the evidence. This is the same as saying that all reasonable minds must agree that the defendant was not guilty of actionable negligence. The very history of this case cries out that such is not true because two juries have refused to so state. Here there are contrary inferences that are permissible. The jury may accept or disregard controverted or uncontroverted testimony, but it and it alone must draw or choose between the conflicting inferences to be drawn and we humbly submit that in its opinion the Court has failed to so rule, and in so doing conflicts with controlling decisions.

(B) In failing to connect up the hose in controversy earlier than it did the defendant was negligent under its own rules and under the facts and circumstances shown in evidence. The Court in its opinion says that this would not be the proximate cause of the accident, but rather that if there were any ice in the coupler, the plaintiff's failure to remove the same would be the sole cause of the accident.

We would humbly submit that this injects contributory negligence and assumption of risk into the case as an entire defense and in so doing conflicts with the Federal Employers' Liability Act, 45 U. S. C. A., § 51 et seq., and Tiller v. Atlantic Coastline Railroad Co., 318 U. S. 54. The negligence, if any, in failing to remove ice from the coupler could be no more than contributory, and a jury could reasonably find in looking at the total negligence picture, as they would be required to do, that the only negligence was that of the employer in requiring the work to be done in a poorly lit place and without adequate tools and help. (These latter two elements would only be submitted in determining the issue of contributory negligence as contrasted to sole negligence, if any, and deal only with the issue of failing to remove the ice from the coupling.)

II.

The Court in its opinion filed points out that this cause was tried on an amended petition. But the testimony was virtually the same, omitting any reference to a sudden jerking of the cars. There are some conflicts as to prior inconsistent statements, but those conflicts are for the jury. This Court in its previous opinion says that it is not inconceivable that a jury might find the defendant negligent in failing to couple up the cars when they were first set out, in order to prevent the formation of ice on

the couplers of the air hose during freezing weather, or that the defendant should have furnished the plaintiff with more adequate means of removing ice from the air hose coupling.

It seems to us that this is still true and is the law of the case. If so, it may not be changed on a second appeal. The law of this case is, we submit, that there is a jury question presented, and the Court in its opinion filed conflicts with its own decision in the case of Illinois Central Railroad v. Crail, 31 F. (2d) 111.

III.

(A) The evidence here shows that there was ice on this coupler. We have already pointed out that the plaintiff was not sure that he removed all of the ice. These are facts not inferences. From this it would seem that the jury could infer that this would interfere with the locking mechanism. A jury has wide range under the Supreme Court decisions and it will not do to say that any reasonable inference is speculation as is clearly set out in Lavender v. Kurn, supra, and other cases cited in appellant's brief. In holding that such inference would be speculation, the Court conflicts with those opinions. Much of what we said under point I, (A) and (B) would here apply and we will not repeat it. In connection with both of these points we would like to submit that in the Court's reasoning to illustrate the sole negligence of appellant, the Court uses the analogy of an auto owner and a garage mechanic or repairmen. We would have no quarrel with the conclusion reached as to that specific situation. But we do question its application here. This for the reason that the relationship of master and servant is not there involved and the duty owing to an independent contractor is very different than that owing to a servant.

Because of the matters here presented and because of the ruling of the Court sustaining a directed verdict in favor of defendant at the close of all of the evidence, we respectfully submit that this opinion is in conflict with the controlling decisions of the Supreme Court which are cited in this petition for rehearing, and we therefore submit that this rehearing should be granted.

Shaw & Smith,
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Certificate of Counsel.

I, Wayne C. Smith, Jr., one of the attorneys for the Appellant, do hereby certify that the foregoing petition for rehearing is submitted in good faith and believed to be meritorious.

Wayne C. Smith, Jr.

Thereafter the petition for rehearing was overruled and the mandate of the United States Court of Appeals for the Eighth Circuit was filed on the 16th day of March, 1956.